# SINGAPORE REPORTS

## Shiffon Creations (S) Pte Ltd v Tong Lee Co Pte Ltd

COURT OF APPEAL (SINGAPORE) — CIVIL APPEAL NO 2 OF 1988
LAI KEW CHAI, CHAN SEK KEONG AND COOMARASWAMY JJ
20 NOVEMBER 1990

*Land Law — Sale and purchase of property — Claim for specific performance and damages in lieu of specific performance — Whether agreement precluded damages — Whether court has jurisdiction to award damages in lieu of specific performance — Chancery Amendment Act 1858 (Lord Cairns' Act) — Courts Ordinance No 3 of 1878, s 10 — Courts Ordinance (Cap 3 of 1955), s 17*

By an agreement dated 16 November 1976 the respondents (vendor) agreed to sell a factory unit to the original purchasers. It was intended that the land and industrial building would be brought under the Land Titles Act and that subsidiary strata certificates of title would be issued to the proprietors of each factory unit. In mid-1982 the original purchasers agreed to sell their equitable interest in the factory unit to the appellants and as strata title to the factory unit had not been issued, it was agreed under the tripartite arrangements that the original purchasers would by deed assign to the appellants all their rights and interest in the factory unit and the respondents would enter into a fresh sale and purchase agreement with the appellants on terms similar in all respects with those contained in the earlier agreement.

The issuing of the strata title was delayed because of several unresolved issues and the appellants were compelled to file the originating summons in 1984 seeking an order compelling the respondents to do all acts necessary in obtaining subdivision approval under the Planning Act and the transfer of strata title of the factory unit, and an inquiry as to damages.

In between the hearing of the originating summons, the respondents took steps to obtain strata title and strata title was issued on 9 March 1987. At the resumed hearing in May 1987, the order for specific performance was therefore no longer necessary and the remaining issues of fact and law were (1) whether there was such delay in obtaining the subdivision approval and subsidiary strata certificate of title as to amount to a breach under cl 11 of the agreement; and (2) if the answer was in the affirmative, whether the claim by the appellants was barred by the concluding part of cl 11.

The trial judge found there was an unreasonable delay which would amount to a breach of cl 11 of the agreement. The trial judge also took the view that cl 11 would preclude him from awarding any damages at law but did not preclude an award of damages in lieu of specific performance. However no award for damages in lieu of specific performance was made as the trial judge concluded that the High Court has no jurisdiction to award damages in lieu of specific performance. The (appellants) purchasers now appeal.

**Held,** dismissing the appeal:

(1) Clause 11 of the agreement operated to exclude any claim for damages both at law and in equity. Since inception, the High Court never had a divided jurisdiction. The damages mentioned in cl 11 must therefore mean damages which the High Court has power to grant. Logically, it follows that if the High Court has power to grant equitable damages as well as common law damages, both kinds of damages to be awarded under the jurisdiction of the High Court are excluded by cl 11.

(2) By saying that the exemption in cl 11 only applied to any delay in obtaining the subdivision approval and the strata title and did not extend to any delay in applying for them is weak because of its undue literalism. Clause 11 refers to acts and steps taken by the respondents as the developers and vendors, and does not refer to the issue of either the subdivision approval or the strata title by the competent authorities. The obtaining of subdivision approval and obtaining strata titles are culmination of a long process which is undertaken by the vendors. Both parties had agreed that the appellants would be exempted from damages for any delay up to that stage of the long process.

(3) The alleged bar in cl 11 does not refer only to the s 9(3) approval but also the delay in obtaining the strata titles. This is because the subdivision approval is closely bound up with the issue of the strata titles as the issue of strata titles follows the subdivision approval and if there had been delay in obtaining subdivision approval, as was found as a fact in this case, it must follow that there would be delay in obtaining the strata titles.

(4) The jurisdiction in Singapore to award equitable damages was statutory in origin and was certainly so regarded in England since the operation of Lord Cairns' Act. The position prior to Lord Cairns' Act was that the Court of Chancery did not have a well established jurisdiction to award damages in equity in lieu of specific performance. The case law prior to Lord Cairns' Act is too uncertain and controversial to support the rule that the Court of Chancery had jurisdiction to award damages in lieu of specific performance. It was only in very exceptional cases that the Court of Chancery had awarded equitable damages. Although the power to award equitable damages was very occasionally exercised by the Court of Chancery, this jurisdiction did not have sufficient time and opportunity to develop before it was superseded by Lord Cairns' Act. Therefore the statutory jurisdiction conferred by Lord Cairns' Act which had been given in effect in Singapore at one time is now not part of the statute book.

**Cases referred to**

1 *Oakacre Ltd* v *Claire Cleaners (Holdings) Ltd* [1982] Ch 197 (refd)
2 *Chapman, Morsons & Co* v *The Guardians of the Auckland Union* (1889) 23 QBD 294 (refd)
3 *Leeds Industrial Co-operative Society Ltd* v *Slack* [1924] AC 851 (refd)
4 *Tan Seng Qui* v *Palmer* (1887) 4 Ky 251 (refd)
5 *Grant* v *Dawkins* [1973] 1 WLR 1406 (refd)
6 *Todd* v *Gee* (1810) 17 Ves Jun 273; 34 ER 106 (refd)
7 *Denton* v *Stewart* 17 Ves 276 n; 34 ER 108 (refd)
8 *Isaac Cleaton* v *William Levason Gower* (1674) Fin (Fin H) 164 (refd)

**Legislation referred to**

Chancery Amendment Act (Lord Cairns' Act) 1858
Courts Ordinance No 3 of 1878 s 10
Courts Ordinance (Cap 3 of 1955) s 17
Supreme Court Act 1981 [UK] s 50

*Liu Yuen Ming (C Trinel* with him) for the appellants.
*Michael Kuah Kim Huat* for the respondents.

*Cur Adv Vult*

**Lai Kew Chai J** (delivering the judgment of the court): This appeal concerns the liability of the vendors in this case to pay damages in contract or in equity for delay in completion of the sale of a factory unit within an industrial building. In the High Court it was held after a trial that an order for specific performance was not necessary since legal completion of the sale and purchase had taken place in between the adjourned hearings and before judgment. In relation to the purchasers' claims for damages at law under the agreement for sale and purchase, the learned judge took the view that cl 11 of the agreement as a matter of construction precluded him from awarding any damages at law. The learned judge, however, was of the opinion that cl 11 did not preclude an award of damages in lieu of specific performance because this action was instituted purely for the equitable relief of specific performance and for damages in addition to or in lieu of specific performance. However, that opinion of the learned judge did not result in an award in favour of the purchasers for damages in lieu of specific performance because the learned judge came to the conclusion that the High Court has no jurisdiction to award damages in lieu of specific performance. Not satisfied with those decisions, the purchasers brought this appeal.

In 1976 the respondents were in the course of developing an industrial building at Kallang Pudding Road, Singapore. By an agreement dated 16 November 1976 they agreed to sell to a company, JC Tuin (Pte) Ltd ('original purchasers') a factory unit on the seventh floor of the building at the price of $162,120. The purchase price was payable by instalments. It was intended that the land and industrial building would be brought under the Land Titles Act and that subsidiary strata certificates of title would be issued to the proprietors of each factory unit within the industrial building. By early 1978 the original purchasers took possession of and occupied the factory unit.

In mid-1982 the original purchasers of the factory unit agreed to sell their equitable interest in the factory unit to the appellants at the price of $607,950. As strata title to the factory unit had not been issued, it was agreed under the tripartite arrangements (a) that the original purchasers would by a deed assign to the appellants all their rights and interest in the factory unit; and (b) that the respondents would enter into a fresh sale and purchase agreement with the appellants on terms similar in all respects with those contained in the earlier agreement except that the appellants were substituted or replaced as the purchasers. These tripartite arrangements were carried into effect on or about 24 September 1982.

It was the common case in this appeal that in September 1982 the prospects of the issue of the strata title for the factory unit were still a long way away because of two unresolved issues. The development of the industrial building was illegal in two respects. The addition of the pump house and water room on the roof of the building and the increase in its total floor area, as a result of the wider spacing of the columns by 6 inches, had not been approved by the competent building authorities. In consequence, the architect of the building project was prosecuted and the subdivision of the land and the regularization of the additions to the building were not resolved for more than two years after the appellants had agreed to purchase the factory unit.

When the appellants entered into the agreement to purchase the factory unit, they did not know and they were not advised by their solicitors of the two legal impediments which were still outstanding and which were delaying the stratification of the industrial building under the Land Titles (Strata) Act. In fact, they learned of them when they sought re-financing from another bank and were told of the two problems as a result of which the other bank rejected the equitable mortgage of the factory unit offered by the appellants. Following this revelation, the appellants through their solicitors pressed the respondents for information. They drew a blank and were compelled to file the originating summons on 30 October 1984.

By an order made in January 1985 the proceedings under the originating summons were ordered to be continued as though begun by writ. The reliefs sought by the appellants were for (i) an order (in effect for specific performance by) compelling the respondents to do all acts necessary to obtain subdivision approval under s 9(3) of the Planning Act and the transfer of strata title of the factory unit; and (ii) an inquiry as to damages.

On 5 November 1985 approval from the competent authority was obtained for the building plans of the building. It was a matter of a few months before subdivision and strata title plans would be approved, after which strata titles to all the factory units within the industrial building would also be issued.

The learned judge began hearing in January 1986 and heard evidence for three days, after which the proceedings were adjourned until they were resumed in May 1987.

In between adjournments, and no doubt at the encouragement of the learned judge, the respondents took steps to obtain the strata titles. On 26 May 1986 subdivision approval under s 9(3) of the Planning Act was obtained. Strata title to the factory unit was issued on 9 March 1987. In April 1987 the respondents duly

delivered to the appellants the duplicate subsidiary strata certificate of title and the executed transfer form in respect of the factory unit.

At the resumed hearing, the order for specific performance was therefore no longer necessary. There remained issues of fact and law which the learned judge had to deal with, namely, whether there was such delay in obtaining the subdivision approval and subsidiary strata certificate of title as to amount to a breach under cl 11 of the agreement; and, secondly, if the answer were in the affirmative, whether the claim by the appellants was barred by the concluding part of cl 11. We will deal with the questions such as an unreasonable delay as to amount to a breach of cl 11 on the part of the appellants. In the appeal before us, no challenge was mounted against this part of the judgment. As stated earlier, the learned judge was of the opinion that cl 11 did not preclude an award of damages in lieu of specific performance but he came to the conclusion that as a matter of law the High Court has no jurisdiction to award damages in lieu of specific performance.

Clause 11 is in the following terms:

> The vendor shall at its own cost and expense obtain (a) the approval of the competent authority under s 9(3) of the Planning Act and (b) the said subsidiary strata certificate of title for the separate disposal of the said premises but any delay in obtaining such approval shall not be a ground for any delay by the purchaser in the payment on due date of any of the instalments of the purchase price mentioned in cl 4 hereof and the interest thereon (if any) *and also shall not be a ground for any action claim or demand for damages by the purchaser against the vendor.*

The learned judge accepted the submission of counsel for the appellants that cl 11 did not preclude the High Court, if it had the jurisdiction, to award damages in lieu of specific performance. He noted that this originating summons was solely for the equitable relief of specific performance and damages in lieu. It was not an action to recover damages at law under cl 11. Therefore this originating summons was outside the ambit of clause 11. He accepted that *Oakacre Ltd* v *Claire Cleaners (Holdings) Ltd*[1] was authority for the proposition that such an award of damages could be made notwithstanding the fact that in between the issue of the writ and judgment the completion of the sale and purchase of the land in question had taken place and notwithstanding the further fact that claims for damages at law were premature. In *Chapman, Morsons & Co* v *The Guardians of the Auckland Union,*[2] it was held by the Court of Appeal that the learned trial judge had jurisdiction to award damages although he did not grant the injunction sought as the nuisance was unlikely to recur except in an exceptionally dry weather. In both cases, the jurisdiction was founded on the Chancery Amendment Act (commonly referred to as Lord Cairns' Act) which was passed in 1858. Inspite of its repeal, the jurisdiction to award damages in lieu of specific performance remained, as was authoritatively stated by Lord Finlay in *Leeds Industrial Co-Operative Society Ltd* v *Slack*[3] at pp 862-863.

Section 2 of Lord Cairns' Act provided as follows:

> In all Cases in which the Court of Chancery has Jurisdiction against a Breach of any Covenant, Contract, or Agreement, or against the Commission or Continuance of any wrongful Act, or for the specific performance of any Covenant, Contract, or Agreement, it shall be lawful for the same Court, if it shall think fit, to award Damages to the Party injured, either in addition to or in substitution for such injunction or specific performance, as such Damages may be assessed in such Manner as the Court shall direct.

The jurisdiction in England which was conferred by s 2 of Lord Cairns' Act is now repeated in s 50 of the Supreme Court Act 1981. It reads as follows:

> When the Court of Appeal or the High Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance.

The learned judge went on to hold that the jurisdiction to award damages in lieu of specific performance is and has always been statutory since the passage of Lord Cairns' Act. It did not, in his view, depend on any inherent jurisdiction of the court. Turning to the position in Singapore, he noted that the obiter dictum of Pellereau J in T*an Seng Qui* v *Palmer*[4] at p 257, was based on s 10 of the Courts Ordinance (No 3 of 1878) which was repeated in s 17(a) of the Courts Ordinance (Cap 3, 1955 Ed) and which reads as follows:

> The original civil jurisdiction of the High Court shall consist of -
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> (a) jurisdiction and authority of a like nature and extent as are exercised by the Chancery and Queen's Bench Divisions of the High Court of Justice in England. . . .

Finally, the learned judge concluded that the High Court had 'no jurisdiction — the equitable jurisdiction conferred by Lord Cairns' Act — to award damages in lieu of specific performance.' He stated his reasons, after tracing the subsequent legislative history of s 17 of the Courts Ordinance (Cap 3, 1955 Ed), in the following terms:

> Unfortunately, the Courts Ordinance (Cap 3), including s 17, was repealed by the Courts of Judicature Act 1964 of Malaysia, and the latter had no provision similar to that of s 17(a) of the Courts Ordinance. Nor did the repealing Act contain any provision saving the jurisdiction conferred by the Courts Ordinance. Astonishing as it may seem, the repealing Act, intentionally or unintentionally, took away the jurisdiction which the High Court had under the Courts Ordinance to award damages under s 2 of the Lord Cairns' Act. The Act of 1964 of Malaysia, with effect from 9 January 1970, ceased to apply to Singapore by virtue of

s 82 of the Supreme Court of Judicature Act (Cap 322, 1985 Ed). This Act also does not have any provision similar to s 17(a) of the Courts Ordinance (Cap 3); nor does it have the equivalent of s 50 of the Supreme Court Act 1981 of England.

We turn to the first question of construction as to whether cl 11 is intended and operates to exclude any claim for damages both in law and in equity. As we have stated, the learned judge was of the opinion that it did not exclude any claim for equitable damages. We have, however, reached a different conclusion for the following reasons, some of which were not canvassed before the learned judge. We agreed with the submissions of counsel for the respondents that cl 11 operates to exclude any claim for damages both at law and in equity. Since inception, the High Court never had a divided jurisdiction. The 'damages' mentioned in cl 11 must therefore mean damages which the High Court has power to grant. Logically, it follows that if the High Court has power to grant equitable damages as well as common law damages, both kinds of damages to be awarded under the jurisdiction of the High Court are excluded by cl 11. We refer to the alternative view that the High Court has no power to grant equitable damages because Lord Cairns' Act was inadvertently repealed. Even if that view is right, the appeal must also fail because on our construction of cl 11, the issue of the jurisdiction of the High Court to award equitable damages or the survival of Lord Cairns' Act is not relevant. Our construction of cl 11 would dispose of this appeal.

However, counsel for the appellants put forward several other arguments in this appeal. We now express or reserve our views on them. The first point turns on the construction of another part of cl 11. Counsel submitted that the exemption in cl 11 only applied to any delay in '*obtaining*' the subdivision approval and the strata title; it did not extend to any delay on the part of the respondents in 'applying' for them. He referred to the situation that even if everything had been done and all surveys and other building approvals had been duly and timeously applied for, there could be some delay in '*obtaining*' subdivision approval and the issue of strata titles. The issue of subdivision approval and the strata titles were matters properly within the province of the competent governmental authorities. In that situation, where the vendors were entirely free from any criticism, they should not be penalized and it was therefore agreed between them and their purchasers such as the appellants that they would not be liable to pay damages. He submitted that the use of the word '*obtaining*' was done advisedly and it stood in contrast with the use of the word '*applying*' in the agreement. A few examples of different words being used in the agreement were given. He pointed out that by cl 2 of the agreement, the respondents shall at their own expense '*obtain*' the strata title. Clause 9 of the agreement required the appellants to '*submit*' for approval proper electrification plans. We are of the view that this submission is weak because of its undue literalism. In our view, this part of cl 11 refers to the acts and steps to be taken by the respondents as the developers and vendors. It does not refer to the '*issue*' of either the subdivision approval or the strata titles by the competent authorities. The obtaining of subdivision approval and the obtaining of the strata titles are the culmination of a long process which is undertaken by vendors. We are of the opinion that both parties had agreed that the appellants would be exempted from damages for any delay up to that stage of the long process.

Secondly, counsel for the appellants submitted that the alleged bar in cl 11 refers only to the delay in obtaining the s 9(3) approval and does not cover the delay in obtaining the strata titles. That submission is founded on the following words in cl 11, namely, 'but any delay in obtaining such approval . . . ' where there is no reference to any delay in obtaining strata titles. In our view this submission must also fail because the subdivision approval is closely bound up with the issue of the strata titles. The issue of strata titles follows the subdivision approval and if there had been delay in obtaining subdivision approval, as was found as a fact in this case, it must follow that there would be delay in obtaining the strata titles.

We turn to the final submission of counsel for the appellants. He accepted that the statutory jurisdiction conferred by Lord Cairns' Act, which was given effect in Singapore at one time, is not part of our statute book. But he submitted that looking at the pre-1858 authorities, the Court of Chancery had awarded damages and that this court should hold that the power to award damages in lieu of specific performance is part of the inherent jurisdiction of the High Court. In the absence of fuller arguments on this issue, we are not inclined to express any firm view on this issue. We agree with the learned judge that jurisdiction in Singapore to award equitable damages was statutory in origin, and was certainly so regarded in England since the operation of Lord Cairns' Act. It is the characteristic feature of a cause of action at common law that a plaintiff seeks the remedy of an award in damages. Equally, it was always or nearly always the distinctive feature of equity never to award damages, as such or as monetary compensation for a breach of contract or a wrongful act. The position would appear to be that prior to Lord Cairns' Act, the Court of Chancery did not have a well established jurisdiction to award damages in equity in lieu of specific performance. The case law prior to Lord Cairns' Act which was referred to in arguments is too uncertain and controversial to support the rule that the Court of Chancery had jurisdiction to award damages in lieu of specific performance.

The uncertainty of the position was best summarized by Goff J (as he then was) in *Grant* v *Dawkins*[5] at pp 1408H-1409G, as follows:

> There seems to be some uncertainty as to what the position was before the Chancery Amendment Act 1858 (Lord Cairns' Act). Thus, Lord Eldon LC in *Todd* v *Gee* (1810) 17 Ves June 273, 277 said:
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> > 'As to the merits, I should be inclined to support the whole course of previous authority against *Denton* v *Stewart* [17 Ves 276(note)]; not being aware, that this court would give relief in the shape of damages; which is very different from giving compensation out of the purchase-money.'
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> It is true that in that case he went on to envisage a claim for damages, not arising directly out of the defective title but by reason of the plaintiff's having agreed to re-sell, but I doubt whether that would be a valid distinction, and in that passage Lord Eldon seems to me to have been saying that the jurisdiction of the court of equity to grant relief in such circumstances would end when the purchase price was exceeded because, as he said, relief in the shape of damages was 'very different from giving compensation out of purchase-money.'
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> On the other hand, I have been referred to a very old case, *Cleaton* v *Gower* (1674) Fin (Fin H) 164, in which the court directed that Gower should execute the agreement in specie, as far as he was capable of doing it, 'and likewise shall satisfy the plaintiff such damages as he hath sustained in not enjoying the premises according to the agreement. . . .' And in *Phelps* v *Prothero* (1855) 7 De GM & G 722, Turner LJ said, at p 734:
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> > 'That it was competent to this court to have ascertained the damages, I feel no doubt. It is the constant course of the court, in cases between vendor and purchaser, upon a sufficient case being made for the purpose, to direct an inquiry as to the deterioration of the estate pending the contract, and in so doing the court is in truth giving damages to the purchaser for the loss which he has sustained by the contract not having been literally performed. This court, when it entertains jurisdiction, deals as far as it can with the whole case, and not with part of it only; and it is well settled by authority that a defendant cannot be allowed, without the leave of the court, to proceed at law on the subject matter of the suit, whilst proceedings in this court are pending, *Frank* v *Basnett* 2 Myl & K 618, and *Bell* v *O'Reilly* 2 Sch & Lef 430, in which latter case Lord Redesdale seems to have considered that the proceeding at law might be treated as a contempt.'
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> So in the view of Turner LJ, not only could a court of equity give damages in addition to specific performance but a plaintiff ought not to seek relief in equity by way of specific performance and damages at law in the common law courts.

In *Todd* v *Gee*[6] Eldon LC, a great Lord Chancellor renowned for his mastery of equity together with a sound common law background, adjourned it from 5 April 1810 to 21 August of that year. Unlike *Denton* v *Stewart*[7] and *Isaac Cleaton* v *William Levason Gower*[8] which were not reserved and the decisions were merely summarized, *Todd* v *Gee*[6] was a direct report of the considered judgment of Eldon LC. The Lord Chancellor said at p 297:

> . . . except in very special cases, it is not the course of proceeding in equity to file a bill for specific performance of an agreement; praying in the alternative, if it cannot be performed, an issue, or an inquiry before the master, with a view to damages. The plaintiff must take that remedy, if he chooses it, at law: generally, I do not say universally, he cannot have it in equity . . .

Although the authoritative value of *Denton* v *Stewart*[7] was severely dented, it has to be recognized (as was expressly noted by Eldon LC) that 'in very special cases' equity did award damages. Two points are noteworthy. First, it was only in very exceptional cases that the Court of Chancery had awarded equitable damages. Secondly, although the power to award equitable damages was very occasionally exercised by the Court of Chancery, this jurisdiction did not have sufficient time and opportunity to develop before it was superseded by Lord Cairns' Act, with the result that its scope was uncertain and indeterminate. That state of case law in equity stood in great contrast to the much wider jurisdiction of equity which was statutorily conferred by Lord Cairns Act. In the result, in the absence of the fullest arguments we would reserve this issue for another day. For these reasons, the appeal is dismissed with costs.

*Appeal dismissed.*

Solicitors: *Lim Ganesh & Liu; Lee & Lee.*

Reported by *Yap Shao Sin*